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No. 85-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BURLINGTON NORTHERN, INC.,
Petitioner,

v.

JACK D. ANDERSON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

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QUESTIONS PRESENTED

1. Where a collective bargaining agreement seeks to prevent double-recovery by providing that medical expenses previously paid by a railroad to an injured employee through an industry plan shall be offset against any damages awarded for such expenses in an action under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60, does such an agreement unlawfully "exempt [the railroad] from . . . liability" as proscribed by Section 5 of that Act?

2. Where a trial judge in an FELA action excludes evidence proffered by a defendant railroad concerning the income taxes payable on plaintiff's lost earnings and refuses to instruct the jury, upon request, that the award of damages to plaintiff is not subject to income taxation, does *Norfolk & Western Railway v. Liepelt*, 444 U.S. 490 (1980), require reversal?

PARTIES TO THE PROCEEDINGS

Jack D. Anderson is the respondent/plaintiff.

As a result of a corporate reorganization, petitioner/defendant Burlington Northern, Inc. is now known as Burlington Northern Railroad Company. The petitioner's parent corporation created in that reorganization is now called Burlington Northern, Inc. Burlington Northern Railroad Company's partially owned subsidiaries and affiliates are as follows:

Burlington Northern Railroad Company:

The Belt Railway Company of Chicago
Camas Prairie Railroad Company
Davenport, Rock Island and
North Western Railway Company
The Denver Union Terminal Railway Company
Houston Belt & Terminal Railway Company
Iowa Transfer Railway Company
Kansas City Terminal Railway Company
Keokuk Union Depot Company
The Lake Superior Terminal and
Transfer Railway Company
Longview Switching Company
The Minnesota Transfer Railroad Company
Paducah & Illinois Railroad Company
Portland Terminal Railroad Company
The Saint Paul Union Depot Company
Terminal Railroad Association of St. Louis
Trailer Train Company
The Wichita Union Terminal Railway Company
Winona Bridge Railway Company

The El Paso Company:

El Paso Natural Gas Company:

El Paso Development Company:

Lake Country Windjammer, Inc.:

Adams Canyon Ranch
Santa Paula Farms

El Paso Hydrocarbons Company:

Minera San Pedro Corralitos, S.A.

Meridian Oil Holding Inc.:

Meridian Oil Inc. (formerly Mileston Petroleum Inc.):

Butte Pipe Line Company
Portal Pipe Line Company

New Mexico and Arizona Land Company:

NZ Development Corp.
NZ Properties, Inc.

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40 Cong. Rec. 7662 (1906) 17
40 Cong. Rec. 7696 (1906) 17
40 Cong. Rec. 7915-20 (1906) 17, 19
42 Cong. Rec. 4427 (1908) 17, 19
42 Cong. Rec. 4527 (1908) 17

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Annual Report of the Director of the Administrative Office of the United States Courts (1985) 28
Comment, *The Construction of Indemnity Agreements Under the Federal Employers Liability Act: A Conflict of Public Policy and Contract Law*, 38 Md. L. Rev. 71 (1978) 18

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Congress Looks at Liability Insurers, New York Times, Feb. 24, 1986 21
Herde, *FELA—Should It Be Abolished?*, 17 Forum 407 (1981) 21
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JACK D. ANDERSON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

The petitioner, Burlington Northern Railroad Company, formerly Burlington Northern, Inc. ("BN"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Montana entered in this proceeding on November 26, 1985.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Montana is reported at 709 P.2d 641 (Mont. 1985), and appears in the Appendix ("App.") at 1a-12a. The judgment of the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, is unreported and appears in the Appendix at 15a.

JURISDICTIONAL STATEMENT

The judgment of the Supreme Court of the State of Montana was entered on November 26, 1985. A timely petition for rehearing was denied on December 19, 1985.

App. at 13a. By order of the Montana Supreme Court entered on December 24, 1985, a stay of enforcement of judgment was extended pending timely filing and disposition of this petition for writ of certiorari. App. at 14a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3) (1982).

STATUTES AND REGULATIONS INVOLVED

This case involves the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60 (1982), and in particular Section 5 of that Act, 45 U.S.C. § 55, which is reproduced in the Appendix at 17a.

STATEMENT OF THE CASE

This case presents two categories of issues that arise during the pretrial and trial of a typical FELA damages case. Prior to trial, the trial court ruled that the plaintiff, an injured employee, could include medical expenses in the damages sought, but that the defendant railroad could not show that it had already paid the medical expenses either directly or through an industry indemnity plan. The defendant was thus denied an offset for the payments already made. During trial, the court ruled that the defendant could not cross-examine plaintiff's witnesses or introduce evidence on the impact of taxes in reducing plaintiff's estimated lost earnings. The court also denied the defendant's request for a jury instruction that any damages awarded to plaintiff would not be subject to federal and state income taxation. These rulings raise important and recurring questions of federal law with respect to the measurement of damages in FELA actions.[1]

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[1] Although the state and federal courts have concurrent jurisdiction for FELA actions, the rules of decision on liability and damages are questions of federal law. *See St. Louis Southwestern Railway v. Dickerson*, —— U.S. ——, ——, 105 S. Ct. 1347, 1348 (1985).

I. FACTUAL BACKGROUND

Jack D. Anderson, an engineer on one of BN's trains, suffered head and neck injuries when he apparently tripped and fell while entering the toilet compartment in his locomotive. As a result of these injuries, Mr. Anderson remained out of work for several months. During that time, he consulted with several doctors and ultimately had a surgical procedure known as a cervical fusion performed on his neck.

Mr. Anderson returned to work for BN as a locomotive engineer, but because of persistent stiffness and tension in his neck, he was unable to work shifts in excess of eight hours. Due to this diminished work capacity, he continued to miss some time on the job. At trial, there was conflicting testimony as to the permanence of Mr. Anderson's injuries and whether he would be able to perform his normal work duties as a locomotive engineer sometime in the future.

BN participates in a railroad industry Health and Welfare Plan administered by the Travelers' Insurance Company ("Travelers"). Pursuant to this plan, Mr. Anderson acknowledges, the medical expenses he incurred for treatment of the injuries sustained in his accident were paid by BN subject to partial reimbursement by Travelers, or paid directly by Travelers.[2] In a 1975 collective bargaining agreement, the railroads and unions specified that all of the payments for medical expenses for on-duty injuries under this plan would be set off against any future recovery by employees in FELA actions to prevent double-recovery:

> Benefits provided under the policy contract will be offset against any right of recovery the employee may have against the employing railroad for hospital, surgical, medical or related expenses of any kind specified in the policy contract.

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[2] *See* Brief of Plaintiff-Respondent Jack D. Anderson before the Montana Supreme Court, at 27-28.

Health and Welfare Agreement (Oct. 22, 1975), App. at 25a.[3] From the date of the accident until trial, Mr. Anderson received $11,795.25 for his medical expenses either directly from BN or through Travelers.

II. TRIAL COURT PROCEEDINGS

Mr. Anderson filed a complaint against BN on February 18, 1981, in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, alleging that his injuries were caused by BN's violation of the FELA and the Boiler Inspection Act.[4] Prior to trial, plaintiff moved for partial summary judgment on the issue of liability under the Boiler Inspection Act. Over the objection of BN, that motion was granted by the trial court on June 8, 1984.[5] Accordingly, a trial was held solely on the issue of damages.

Before the damages trial began, the plaintiff submitted a motion *in limine* requesting an order from the court excluding certain facts from being discussed or offered into evidence in the presence of the jury. One of the specified items was "[t]hat the Burlington Northern and/or Traveler's Insurance paid part or all of the medical related charges Mr. Anderson incurred following the accident on February 28, 1978." BN resisted this motion, and after the submission of briefs and oral argument, the trial judge granted plaintiff's request.[6] As a result of

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[3] This Health and Welfare Agreement appeared as an exhibit to defendant's pre-trial Brief in Opposition to Plaintiff's Motion *In Limine*, and again in the Brief of Defendant-Appellant Burlington Northern Railroad Company before the Montana Supreme Court.

[4] 45 U.S.C. § 23 (1982).

[5] Although BN vigorously contested the trial court's granting of summary judgment on the issue of liability before the Supreme Court of the State of Montana, only the important damages issues are presented in this petition.

[6] The trial judge's ruling on this motion was given orally and not transcribed. However, it is undisputed that the motion was granted. App. at 10a.

this ruling, BN was precluded from offering any evidence as to the previous payment of Mr. Anderson's medical expenses.

The evidence submitted by plaintiff included the expert testimony of an economist concerning Mr. Anderson's lost earnings from the date of the accident until trial ($58,965), and the present value of the reduction in earnings capacity over the remainder of his working life ($181,504). Thus, plaintiff argued for a total of $240,469 in lost wages. BN presented an annuity broker who testified that plaintiff's lost future earnings could be fully compensated for by various annuity programs at a cost ranging between $63,775 and $90,673. Combined with its estimate of past lost earnings, BN argued at trial for a damage award as low as $115,000.

BN was prohibited, however, from submitting any evidence or cross-examining any witnesses to show that plaintiff's lost earnings should be reduced to reflect the effect of income taxes. In this regard, BN made a specific proffer at trial based upon Mr. Anderson's income tax returns for the years 1974 through 1982, which demonstrated that plaintiff's income tax liability amounted to approximately 17 percent of gross earnings. App. at 21a-22a. The judge rejected this evidence and refused to instruct the jury that the damages award should be based upon net earnings after the payment of income taxes. App. at 23a-24a. The railroad also requested an instruction based upon *Norfolk & Western Railway v. Liepelt*, 444 U.S. 490 (1980) ("*Liepelt*"), that "[a]ny award you make to plaintiff will not be subject to federal and state income taxes." App. at 18a. The trial court denied this request as well. App. at 23a-24a.

At the conclusion of the trial on damages, the jury returned a general verdict in favor of plaintiff in the amount of $195,000. App. at 15a. Under the court's jury instructions, this amount included compensation for actual

and future medical expenses, for past and future lost earnings, for any physical pain and emotional distress, and for the destruction, if any, of plaintiff's capacity to pursue an established course of life. App. at 19a-20a. However, the trial court directed an additional verdict of $11,795.25 for Mr. Anderson's medical expenses and entered a total judgment in the amount of $206,795.25. App. at 15a-16a. In effect, this judgment resulted in the triple payment by BN of the plaintiff's medical expenses: once through the Health and Welfare Plan; again through the jury's verdict; and a third time by addition of the expenses to the judgment.

III. MONTANA SUPREME COURT DECISION

On appeal, BN contested the trial court's refusal to permit any evidence or instruction on BN's payment of plaintiff's medical expenses, the court's refusal to allow evidence and instruct the jury on the effect of income taxes on plaintiff's lost earnings calculations, its failure to instruct the jury as to the nontaxability of any award for damages, as well as other claims of error not at issue in this petition. The Supreme Court of the State of Montana essentially denied petitioner's appeal by affirming the jury award of $195,000 to plaintiff. App. at 1a. The Montana Supreme Court did, however, reverse the trial court's directed verdict of an additional $11,795.25 for medical expenses, thus reducing the triple-recovery to double-recovery. App. at 12a.

The court recognized that the nontaxability instruction requested by BN was proper under *Liepelt*, but concluded that since the damages awarded by the jury were less than projected by plaintiff's witnessses, "any error in failing to give a nontaxability instruction is harmless." In so holding, the court below recognized that the "Federal Circuit Courts of Appeal are not in agreement on this issue." App. at 9a-10a. BN's claim of error concerning the admissibility, under *Liepelt*, of evidence as to the

effect of income taxes on plaintiff's lost earnings was not addressed in the court's opinion.

As to the double-payment of medical expenses, the court recognized that the Health and Welfare Agreement provided for a set-off of such benefits against later recovery at trial, but held that such negotiated agreements were invalid under Section 5 of the FELA. In the court's view, Section 5 "broadens application of the collateral source rule" in FELA cases involving an insurance plan, to allow set-off only of "the premiums, not what the premiums bought." Quoting a ruling by Chief Judge Battin of the federal district court in Montana, the court found that the 1975 Health and Welfare Agreement was an attempt to "[contract] away the benefits of [§ 5]." The court stated "[w]e will follow Judge Battin's interpretation of 45 U.S.C. § 55 and hold that the provision of the collective bargaining agreement relied on by BN is void." Accordingly, the court concluded, the medical benefits already paid to plaintiff were collateral and could not be set off from the damages award. App. at 10a-12a.

BN filed a timely petition for rehearing on these damages questions. The petition noted that the court had overlooked BN's arguments concerning the trial court's exclusion of relevant evidence as to the effect of income taxes on lost wages, and that its decision conflicted with numerous federal and state court decisions holding that the refusal to give a requested nontaxability instruction could not be harmless error. Petitioner also argued that the ruling of the court on medical expenses was inconsistent with several decisions from other jurisdictions allowing set-off on the ground that medical expense reimbursement plans, such as the Health and Welfare Plan involved in this case, were designed to indemnify the employers against liability and not as a source of compensation to the employees.

The petition for rehearing was denied without opinion; however, the court granted BN a stay of execution of the judgment pending the filing of this petition for certiorari.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW, THAT SECTION 5 INVALIDATES A COLLECTIVE BARGAINING AGREEMENT REQUIRING SET-OFF OF PRIOR PAYMENTS, BRINGS TO A HEAD A SERIOUS ISSUE OF FELA POLICY ON WHICH THE LOWER COURTS ARE IN CONFLICT

The decision below reflects the disarray and widespread confusion characterizing the current jurisprudence of Section 5 of the FELA. The Montana Supreme Court held that Section 5 prevents a railroad from setting off against an FELA award the medical expense payments previously made through a railroad-funded indemnity plan. In contrast, many other courts have permitted such a set-off of expenses paid under the same or similar plans.[7] The court's error is particularly significant, moreover, because the court used its flawed statutory analysis of Section 5 to invalidate an industry-wide collective bargaining agreement explicitly providing for and explaining the set-off. This result runs roughshod over well-established federal policy counseling against interference in the substantive terms of a collective bargaining agreement,[8] and is in conflict with decisions of several circuits and state courts. The decision below does damage to employer-employee relations in the railroad industry, unnecessarily singles out the railroads for anomalous treatment in the medical benefits area, and poses a substantial obstacle to resolution of the current liability insurance crisis.

A. Background Of The Problem: Railroad Payment Of Medical Expenses Incurred By Injured Employees

The controversy underlying this case arises because of the juxtaposition of the FELA and the long-standing rail-

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[7] *See* notes 16-18, *infra.*

[8] *See UMWA Health & Retirement Funds v. Robinson*, 455 U.S. 562, 576 (1982); *Chicago & North Western Railway v. United Transportation Union*, 402 U.S. 570, 579 n.11 (1971).

road practice of providing or paying for medical treatment when employees are injured on the job.[9] This practice assures that employees are treated promptly and adequately, and also that employees do not have to sue their employers in order to receive compensation for these significant expenses. Railroad employees thus rarely if ever bear any costs of treatment for on-duty injuries.

For the past thirty years, most of the nation's railroads have arranged for administration and payment of these medical expenses through a plan offered by the Travelers' Insurance Company—Group Policy No. GA-23,000.[10] The plan is financed by the railroads on a "premium-plus" basis;[11] that is, each railroad pays the insurance carrier an amount sufficient to cover its share of anticipated medical expenses, plus an additional amount as a fee for the company's services in administering the plan.[12] This system of financing medical care for employees is firmly established in the industry, and serves important interests of both the railroads and their employees. Payment of employees' medical expenses by a railroad under this program creates a recurring issue of double-recovery, however, when those employees also attempt to recover medical expenses as damages in FELA actions against the railroad.

Courts have analyzed the propriety of such recovery by applying the common law "collateral source" doctrine. Briefly stated, this doctrine provides that payments made by collateral sources (sources other than the defendant) covering elements of the plaintiff's injury are not credited against a judgment. *See* Restatement (Second) Torts, § 920A, comment (b) (1982). Whether payments made

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[9] *See Nelson v. Penn Central Railroad*, 415 F. Supp. 225, 227 (N.D. Ohio 1976); *Thomas v. Penn Central Co.*, 379 F. Supp. 24, 26 (W.D. Pa. 1974).

[10] *See Thomas v. Penn Central Co.*, 379 F. Supp. at 26.

[11] *See* App. at 25a-26a.

[12] *See Nelson v. Penn Central Railroad*, 415 F. Supp. at 226.

to a plaintiff-employee through an insurance policy procured by a defendant-employer are collateral, and thus not subject to set-off, depends on whether the employee actually bore the cost of the insurance in the form of a deduction or diversion from wages.[13]

The federal and state courts have had a surprising amount of difficulty determining how railroad-funded medical benefit plans should be characterized for purposes of the collateral source doctrine. Their rulings have been inconsistent and unpredictable even when the same plan, such as Group Policy No. GA-23,000, is in issue. Accordingly, employee-plaintiffs have frequently been allowed to recover damages from the railroad for medical expenses the railroad had already paid, a result at least two members of the Second Circuit have characterized as "shockingly unjust." [14]

The courts that allow double-recovery have reasoned that the medical expense plan was part of the employees' total compensation package, that it was paid for with funds that would otherwise have been paid to the employees as wages, and accordingly, that the railroads cannot take advantage of the medical expense payments to reduce their FELA liability.[15] Under this view Group

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[13] *Compare Nelson v. Penn Central Railroad*, 415 F. Supp. at 226-27, *with Hall v. Minnesota Transfer Railway*, 322 F. Supp. 92, 96 (D. Minn. 1971).

[14] *See Blake v. Delaware & Hudson Railway*, 484 F.2d 204, 207-08 (2d Cir. 1973) (Friendly and Lumbard, J.J., concurring).

[15] *See Wilcox v. Clinchfield Railroad*, 747 F.2d 1059 (6th Cir. 1984); *Patterson v. Norfolk & Western Railway*, 489 F.2d 303 (6th Cir. 1973); *Blake v. Delaware & Hudson Railway*, 484 F.2d 204 (2d Cir. 1973); *Urbaniak v. Erie Lackawanna Railway*, 424 F. Supp. 981 (W.D.N.Y. 1977); *Hail v. Minnesota Transfer Railway*, 322 F. Supp. 92 (D. Minn. 1971); *Southern Pacific Transportation Co. v. Allen*, 525 S.W.2d 300 (Tex. Civ. App. 1975). *See also Russo v. Matson Navigation*, 486 F.2d 1018 (9th Cir. 1973) (Jones Act).

The Jones Act incorporates Section 5 of the FELA, and cases under each statute therefore have precedential value for the other. 46 U.S.C. § 688 (1982).

Policy No. GA-23,000 and similar plans are not devices to indemnify the railroads for potential liability, but rather are collateral sources of income to the employees.

On essentially the same facts, other courts have reached the better-reasoned conclusion that such plans are, in fact, wholly funded by the railroads and not by diversion of employees' wages, and are simply arrangements for paying employee medical bills for which railroads may be liable under FELA.[16] It would be incongruous, these courts hold, to penalize an employer for planning in advance for such expenses and paying them promptly, while charging other employers that do not make such arrangements only once.[17] If necessary to prevent double-payment and double-recovery, therefore, these courts have directed that benefits previously paid under the medical plan should be deducted from any FELA damages awarded.[18]

This diversity of interpretation—often involving the same medical plan and the same underlying collective bargaining agreements—has caused great concern for both employers and employees. By the mid-1970's, it was apparent that without clearer evidence from the parties themselves of the true nature and source of the medical benefits received by railroad employees, the results of particular cases would continue to be unpredictable and in-

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[16] *See Wagner v. Reading Co.*, 428 F.2d 289 (3d Cir. 1970); *Thomas v. Humble Oil & Refining Co.*, 420 F.2d 793 (4th Cir. 1970); *Diaz v. Indiana Harbor Belt Railroad*, Civ. No. H 79-13 (N.D. Ind. Dec. 1, 1981) (App. at 41a); *Nelson v. Penn Central Railroad*, 415 F. Supp. 225 (N.D. Ohio 1976); *Thomas v. Penn Central Co.*, 379 F. Supp. 24 (W.D. Pa. 1974); *Rogers v. Chicago & North Western Transportation Co.*, 59 Ill. App. 3d 911, 375 N.E.2d 952 (Ill. App. 1978).

[17] *See Nelson v. Penn Central Railroad*, 415 F. Supp. at 226 (*citing Haughton v. Blackships, Inc.*, 462 F.2d 788, 791 (5th Cir. 1972)).

[18] *See also Clark v. Burlington Northern, Inc.*, 726 F.2d 448 (8th Cir. 1984).

consistent. In his concurring opinion in *Blake v. Delaware & Hudson Railway*, 484 F.2d 204 (2d Cir. 1973), Circuit Judge Friendly suggested the following:

> If the railroads wish to avoid the harsh result reached by the district court [allowing the plaintiff to recover for medical bills he did not pay], they can accomplish this by specific provision in the collective bargaining agreement.

Id. at 207. *See also Urbaniak v. Erie Lackawanna Railway*, 424 F. Supp. at 984.

Following this advice, BN and the other railroads represented by the National Carrier Conference Committee negotiated and entered into a Health and Welfare Agreement, dated October 22, 1975, with the major railroad employee unions. App. at 25a. Article III of that agreement provides as follows:

> The parties hereto do not intend that benefits provided under the policy contract will duplicate, in whole or in part, any amount recovered from either the employing railroad or a third party tort-feasor for hospital, surgical, medical or related expenses of any kind specified in the policy contract, and they intend that benefits provided under the policy contract will satisfy any right of recovery against the employing railroad for such benefits to the extent of the benefits so provided. Accordingly,
>
> (1) Benefits provided under the policy contract will be offset against any right of recovery the employee may have against the employing railroad for hospital, surgical, medical or related expenses of any kind specified in the policy contract.

Thus, the parties stated in the clearest possible terms their intention that the medical benefits provided under Group Policy No. GA-23,000 should be set off from any subsequent FELA award of medical expenses.

B. The Conflicting Rulings On The Validity Of Collectively Bargained Set-Offs Create An Intolerable Dilemma For The Railroads

After suggesting that the confusion in the area of set-offs for medical expenses could be resolved by specific contractual language indicating the parties' intent, the courts are now split on whether such collective bargaining agreements are valid under Section 5 of the FELA. This conflict relegates the parties back to the morass of varying, unpredictable treatment in different jurisdictions and, even worse, eliminates the only apparent means of resolving the confusion.

The disturbing trend towards challenging these agreements under Section 5 was noted as early as 1978.[19] Most courts that have considered the question enforce such agreements, viewing them as appropriate evidence that employees did not contribute to the plans and are therefore not entitled to double-recovery.[20] These courts properly hold that Section 5 does not prevent set-off of the payments made by the plan. As one court ruled, "so long as the employee received full compensation for his injuries," whether from the judgment or advance payment, Section 5 does not come into play. *Thomas v. Penn Central Co.*, 379 F. Supp. 24, 27 (W.D. Penn. 1974). A collective bargaining agreement that "provide[s] and pre-

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[19] *See* Opperthauser, *Collateral Source Rule—Where Are We Now?*, 24(12) The Bulletin 7, 9 (Natl. Assoc. of R. Trial Counsel, Dec. 1978).

[20] *See Clark v. Burlington Northern, Inc.*, 726 F.2d at 451; *Thomas v. Humble Oil & Refining Co.*, 420 F.2d at 794-95; *Diaz v. Indiana Harbor Belt Railroad*, slip op. at 4 (App. at 44a-45a); *Nelson v. Penn Central Railroad*, 415 F. Supp. at 226; *Thomas v. Penn Central Co.*, 379 F. Supp. at 27-28; *Rogers v. Chicago & North Western Transportation Co.*, 375 N.E.2d at 957-58.

serve[s]" an employee's rights is not a device to exempt the employer from any liability.[21]

The court below, however, followed a contrary interpretation of Section 5 and invalidated the 1975 Health and Welfare Agreement. First, the court ruled that the "proviso" in Section 5 "allows BN to 'set off only the premiums, not what the premiums bought.'" App. at 11a-12a. This concept was popularized by dictum in the Second Circuit *Blake* case and has been uncritically adopted by many courts as a bar to set-off of medical expense payments.[22] The court below further ruled that Section 5 "prevents BN from contracting away the benefits of [Section 5] as was attempted by the Health and Welfare Agreement between the union and the railroad." Thus, the Montana Supreme Court joined the federal district court in Montana and a California appellate court in finding that Section 5 precludes collectively-bargained set-off agreements.[23]

These conflicting rulings on whether contracts such as this Health and Welfare Agreement are void under Section 5 create an ironic and intolerable dilemma for railroad employers.[24] Financial assistance for medical ex-

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[21] *Thomas v. Humble Oil & Refining Co.*, 420 F.2d at 795; *see also Thomas v. Penn Central Co.*, 379 F. Supp. at 27 ("a method of obtaining funds to pay such liability [does] not fall within the prohibition of the Statute").

[22] *See, e.g., Lucht v. Chesapeake & Ohio Railway*, 489 F. Supp. 189, 190 (W.D. Mich. 1980); *Urbaniak v. Erie Lackawanna Railway*, 424 F. Supp. 981, 982 (W.D.N.Y. 1977); *Southern Pacific Transportation Co. v. Allen*, 525 S.W.2d 300, 307 (Tex. Civ. App. 1975).

[23] *Folkestad v. Burlington Northern, Inc.*, No. CV-83-84-BLG (D. Mont. Sept. 30, 1985), *appeal pending*, Nos. 85-4280 & 4305 (9th Cir.); *Herbst v. Burlington Northern Railroad*, CV-84-51-BLG (D. Mont. April 22, 1985) (App. at 32a); *Lopez v. Southern Pacific Transportation Co.*, 1 Civ. No. 40048 (Cal. App. 1977) (App. at 34a).

[24] Disallowance of the contractual set-off also increases the disparity between the railroad's employees and employees subject to

penses presents the potential for double exposure if the payments made are interpreted as fringe benefits under the collateral source rule. The industry has tried to resolve this problem logically and reasonably, as Circuit Judge Friendly suggested, through collectively bargained contracts such as the 1975 Health and Welfare Agreement. Some courts are now holding such contractual provisions invalid, although they are the best relevant evidence on the subject. The railroads are thus trapped; under the collective bargaining contracts with the rail employee unions they must continue to fund the massive health and welfare program, but they have no way to assure that they will not be required to pay for those expenses *twice*.

C. The Opinion Below, And Similar Decisions, Completely Misconstrue Section 5 Of The FELA

The decision of the Montana Supreme Court does not rest on a careful application of the collateral source rule to the facts of the case, but wholly on a legal interpretation of Section 5 of the FELA. The court's reasoning exemplifies the current confusion over the scope and purpose of this statute.

Section 5 renders void contracts, rules, regulations and devices whose "purpose or intent" is to enable a railroad to "exempt itself from any liability" created by FELA. 45 U.S.C. § 55 (App. at 17a). A proviso to this Section then states that, notwithstanding this general prohibition, a railroad may set off in any FELA suit "any sum it has

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workmen's compensation schemes. Outside the railroad industry, courts consistently enforce contractual set-off provisions designed to prevent double-recovery where an employee benefit plan supplements workmen's compensation. *See Anderson v. Union Oil Co.*, 49 Cal. App. 3d 968, 123 Cal. Rptr. 191 (1978); 2 *Larson's Workmen's Compensation* 18-9, 18-32-34 (1985); *cf. Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981) (set-off of workmen's compensation against retirement benefits sanctioned by ERISA).

contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee . . . on account of the injury or death for which said action was brought." *Id.* The two-part structure of Section 5—involving both a general prohibition and a proviso—was responsive to the dual objectives of the statute's proponents.

When FELA was under consideration near the turn of the century, Congress was concerned with railroad practices by which, it was believed, railroads were "exempting" themselves from liability for personal injuries. These practices included employment applications that contained releases from all personal injury claims, and agreements that made acceptance of medical treatment or benefits from "relief associations" established by the railroads a bar to further claims or suit.[25] To the extent of such release or bar, Section 5 rendered these arrangements void.[26]

Congress did not outlaw relief associations, however, or any other means by which the railroads might facilitate medical treatment for their employees. On the contrary, Congress encouraged such railroad efforts by allowing a credit for the benefits so provided:

> [I]n the event of an employee being injured, and the railroad corporation takes him to a hospital, paying perhaps hundreds and possibly thousands of dollars for his care, if afterwards action is resorted to to recover damages for that injury, the railroad corporation ought to have the benefit of that expense. . . . [I]f a railroad corporation expends money for the comfort and restoration of the health, or it may be the preservation of life of an injured employee,

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[25] *See* H.R. Rep. No. 1386, 60th Cong., 1st Sess. 6-9 (1906).

[26] *See Duncan v. Thompson*, 315 U.S. 1 (1942); *Philadelphia, Baltimore & Washington Railroad v. Schubert*, 224 U.S. 603 (1912); *Bay v. Western Pacific Railroad*, 595 F.2d 514, 516 (9th Cir. 1979).

> in the event of the employee being awarded damages in the courts, *the corporation should have the benefit of what it has contributed*: and that, I understand, is what this bill proposes to do.

40 Cong. Rec. 7662 (1906) (remarks of Mr. Gallinger) (emphasis added).[27] The proviso was therefore added to Section 5 in order to make clear that, even if a contract or device sought to exempt a railroad from liability in violation of Section 5, a railroad could still set off the benefits provided to the employee through such a contract or device.[28]

In this light, the Montana Supreme Court's analysis is deficient in three principal respects. First, the parties to the Health and Welfare Agreement are not "contract-

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[27] *See also* 42 Cong. Rec. 4527 (1908) (remarks of Mr. Dolliver); 40 Cong. Rec. 7662 (1906) (remarks of Mr. Foraker).

[28] *See* 42 Cong. Rec. 4427 (1908) (remarks of Mr. Sterling); 42 Cong. Rec. 4527 (1908) (remarks of Mr. Dolliver); 40 Cong. Rec. 4607 (1906) (remarks of Mr. Henry).

The legislature's intent was made particularly clear because an attempt to delete the proviso was debated on the Senate floor. *See* 40 Cong. Rec. 7661-62, 7696, 7915-20 (1906). The proponents of the proviso defended it on the ground, among others, that it would be grossly unfair to deny the railroads credit for the medical benefits provided, even if the railroad practices were objectionable in some other respect. *See, e.g.*, 40 Cong. Rec. 7696 (1906) (remarks of Mr. LaFollette). The proponents finally introduced a letter from the legislative representative of the railroad employee unions, H.R. Fuller, which stated:

> With regard to the amendment proposed by Senator Daniel, to strike out the proviso contained in section [5] of the employers' liability bill (H.R. 239), I am authorized on behalf of the 230,000 railroad employees who are seeking this legislation, and in whose interest it is supposed to be, to express the hope that this amendment will not be adopted for the following reasons: . . . [f]rom a moral standpoint, we think it only just and fair that the carrier should be given credit for such amounts as it has actually paid to an injured employee on account of such injury.

40 Cong. Rec. 7919-20 (1906). The effort to remove the proviso was then defeated. *Id.* at 7920.

ing away the benefits" of Section 5. The Health and Welfare Agreement is not a contract or device whose purpose or intent is to exempt the railroad from liability. As the Agreement itself makes clear, the railroads use the Health and Welfare Plan to meet their potential liability, that is, to pay expenses for which an employee may have a right of recovery under FELA. The plan is, in that sense, an indemnification plan. It is settled law that railroads may indemnify themselves in this way.[29]

The set-off prescribed by the Health and Welfare Agreement does not render the agreement void merely because it may have the effect of reducing a plaintiff's verdict. Section 5 has never prevented a set-off or reduction in damages when a railroad has paid amounts to an employee-plaintiff before judgment in connection with his claim or as an advance for sums that may be awarded in an FELA suit.[30] Set-offs of this kind do not leave any element of plaintiff's claim unrecompensed, they merely alleviate double-payment of any or all of the claim.

Second, the court's reading of the proviso (based on the dictum in *Blake*) turns the proviso on its head. Congress clearly intended to *assure* the railroads a set-off for medical benefits they provided, and did not intend that the proviso would be used to *deny* a set-off. The proviso was not intended to govern all set-off questions arising in FELA cases, but instead had a specific and more limited

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[29] *See Chicago & North Western Railway v. Davenport*, 205 F.2d 589, 594 (5th Cir. 1953) (*quoting Gaulden v. Southern Pacific Co.*, 78 F. Supp. 651, 655-56 (N.D. Cal. 1948), *affirmed*, 174 F.2d 1022 (9th Cir. 1949)), *cert. denied*, 346 U.S. 930 (1954); *Thomas v. Penn Central Co.*, 379 F. Supp. at 27; Comment, *The Construction of Indemnity Agreements Under the Federal Employers Liability Act: A Conflict of Public Policy and Contract Law*, 38 Md. L. Rev. 71, 99-100 (1978). *Cf. Hall v. Minnesota Transfer Railway*, 322 F. Supp. at 95.

[30] *See Hogue v. Southern Railway*, 390 U.S. 516, 518 (1968); *Clark v. Burlington Northern, Inc.*, 726 F.2d 448, 451 (8th Cir. 1984); *O'Tell v. New York, New Haven & Hartford Railroad*, 236 F.2d 472, 474-75 (2d Cir. 1956); *Burlington Northern, Inc. v. Lester*, 48 Or. App. 579, 617 P.2d 906, 909-10 (1980).

purpose: to preserve a set-off in cases where a railroad contract is void under the general prohibition, but the railroad has also "paid any benefit or any insurance *by virtue of such a contract.*" 42 Cong. Rec. 4427 (1908) (remarks of Mr. Sterling) (emphasis added).[31] Where, as here, the contract at issue is not void under the general prohibition of Section 5 as properly construed, the proviso is wholly irrelevant.

Lastly, even if the proviso is applied to this case, all the medical benefits at issue qualify for set-off. The phrasing of the proviso in terms of what the "carrier . . . contributed or paid" was not meant to distinguish between premiums paid and benefits bought, as suggested in *Blake* and repeated by other courts,[32] but to differentiate between the contributions made by employers and those made by employees.[33] Congress was informed in 1905 that employees were contributing as much as 80% of the funds used by the relief associations.[34] The drafters of Section 5 thus intended to deny the railroads credit for the portion of benefits that the *employees* had contributed

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[31] *See also Philadelphia, Baltimore & Washington Railroad v. Schubert*, 224 U.S. 603, 613 (1912); *Pittsburgh, Cincinnati, Chicago & St. Louis Railway v. Miller*, 120 N.E. 706, 708 (Ind. 1918).

[32] *See* note 22, *supra.*

[33] 40 Cong. Rec. 7917 (1906) (remarks of Messrs. Mallory and Daniel). *See Chicago & Alton Railroad v. Wagner*, 239 U.S. 452, 458 (1915).

During the debates, Congress also was reminded of the provisions of an earlier statute, the Arbitration Act, which made criminal any attempt by a railroad that had participated in a relief fund to claim a release from liability "beyond the proportion of the benefits arising from employer's contribution to such fund." *See* ch. 370, 30 Stat. 424 (1898); 40 Cong. Rec. 7916-17 (1906) (remarks of Mr. Daniel). The concept of differentiating benefits by the proportion of employer and employee contributions clearly underlay the discussion of Section 5.

[34] *See* 40 Cong. Rec. 7917 (1906) (remarks of Mr. Daniel); *Regulation of Railway Rates: Hearings Before The Senate Comm. on Interstate Commerce*, 58th Cong., 3d Sess. 3187 (1905) (testimony of H.R. Fuller).

but to allow a full and unrestricted offset for benefits derived from *employer* contributions.

Thus, the appropriate inquiry for a court facing this issue is the extent to which benefits are funded by the railroad. The Health and Welfare Agreement made clear that the benefits paid in this case were funded *solely* by the railroad.[35] Rather than heeding the Health and Welfare Agreement and permitting set-off as contemplated by the proviso, the court below ruled the Agreement invalid under the proviso. This profound subversion of the statute, induced by comments in earlier opinions, requires prompt reversal by this Court before it inspires further confusion.

D. This Case Presents A Serious Issue Of FELA Policy Requiring The Court's Guidance

The significance of the confusion surrounding Section 5 should not be underestimated. Section 5 is the centerpiece of this major statute—its "great catch-all safeguard." [36] As the Court has explained, "the scope of Section 5 is of fundamental importance in the administration of the Federal Employers' Liability Act." [37] Because Section 5 is incorporated in the Jones Act,[38] moreover, this controversy affects the shipping industry as well as the railroads.[39]

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[35] *See also* Article I of the Health and Welfare Agreement ("the railroads to pay the cost of providing such benefits"). App. at 25a-26a.

[36] Richter & Forer, *Federal Employers' Liability Act*, 12 F.R.D. 13, 52 (1952).

[37] *Duncan v. Thompson*, 315 U.S. 1, 5 (1942).

[38] *See* note 15 *supra*.

[39] *Compare Seifried v. Mon River Towing*, 388 F. Supp. 233 (W.D. Pa. 1974) (denying set-off of medical expense payments), *with Thomas v. Humble Oil & Refining Co.*, 420 F.2d 793 (4th Cir. 1970) (allowing set-off).

As outlined above, the results of particular cases involving medical benefit set-offs have been erratic and courts even disagree on the validity of collective bargaining agreements designed to alleviate this confusion. Because of the varying treatment of these contracts, employees of the same company, who are members of the same union, working in different states, face different damage regimes. Some will be able to double-recover and some will not. Such possibilities encourage forum-shopping, which is already a problem in FELA cases.[40] This result is clearly inequitable, and weakens the Congressionally mandated uniform rule of law under FELA.[41]

The issue presented here is a recurring one, involving a significant portion of the more than 3,000 FELA claims filed in federal and state courts each year.[42] The issue is an important one: in 1984, the most recent year for which statistics are available, petitioner alone paid over $6 million in premiums for the on-duty injury fund under Group Policy No. GA-23,000. In that same year, according to information gathered by the Association of American Railroads ("AAR"), the railroad industry paid out through GA-23,000 over $30 million for medical expenses incurred in connection with on-duty injuries. Moreover, with medical and insurance costs continuing to escalate, the potential impact of liability for *double* payment through FELA threatens to become even larger.[43]

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[40] *See* Herde, *FELA—Should It Be Abolished?*, 17 Forum 407, 411, 413-14 (1981).

[41] *See Norfolk & Western Railway v. Liepelt*, 444 U.S. at 493 n.5.

[42] That number is likely to grow if employees with negligible amounts of other damages but large medical expenses are now permitted to bring suit for those expenses, notwithstanding the 1975 Health and Welfare Agreement and others like it.

[43] The precedent of double-recovery set by the court below may also have severe implications for ongoing self-insurance efforts in

This double-payment/double-recovery issue is typically addressed (as in this case) before trial in motions *in limine*. Incorrect and unjust rulings on such motions may go unresolved for years or evade correction completely because of the high proportion of settlements in these cases. Because of the serious misconceptions of statutory purpose, continuing confusion in the courts over the proper handling of medical expense payments, and the huge monetary and practical significance of this issue for the railroad industry, petitioner respectfully requests that the Court take this opportunity to address the issue.

II. THE DECISION BELOW FAILS TO FOLLOW THIS COURT'S HOLDINGS IN *LIEPELT* AND EXEMPLIFIES A GROWING CONFLICT AMONG APPELLATE COURTS AS TO THE PREJUDICIAL IMPACT OF A FAILURE TO INSTRUCT A JURY ON THE TAX CONSEQUENCES OF AN FELA DAMAGE AWARD

The lower court's decision is one of a growing body of appellate cases in which this Court's decision in *Norfolk & Western Railway v. Liepelt*, 444 U.S. 490 (1980), has been ignored or circumvented. Although recognizing that the trial court's refusal to instruct the jury on the nontaxability of any damage award was contrary to *Liepelt*, the court below brushed the error aside as "harmless." Moreover, the court below entirely ignored the trial court's refusal to admit evidence as to the effect of income taxes on plaintiff's lost earnings, as required by *Liepelt*. The proliferation of decisions ignoring or undermining the holdings of *Liepelt* on these important

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the railroad and other industries. *See Congress Looks at Liability Insurers*, New York Times, Feb. 24, 1986 at D1, Col. 2. A company that finds its insurance costs too high may also be unwilling or unable to self-insure if benefits provided by such a program are susceptible to double-recovery in private lawsuits.

issues of FELA law requires prompt correction by this Court.

A. The Montana Supreme Court's Harmless Error Treatment Of The Denial Of A Requested *Liepelt* Nontaxability Instruction Conflicts With Numerous Federal And State Appellate Decisions

This Court has emphasized that damage awards in FELA cases should reflect the real economic loss of plaintiffs.[44] This principle was reaffirmed just last Term when the Court summarily reversed a lower court decision which had denied the right of a defendant in an FELA case to adduce evidence and have the jury instructed on the present value of future payments or other pecuniary benefits. *See St. Louis Southwestern Railway v. Dickerson*, 105 S. Ct. at 1348-49.

In *Liepelt*, this Court held that it was reversible error for a trial court (1) to refuse a jury instruction that damages for lost wages are not subject to federal and state income taxation, and (2) to deny a railroad defendant the opportunity to submit relevant evidence as to the effect of income taxes on a plaintiff's lost earnings. 444 U.S. at 493-98. *See also Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 534 (1983) (reaffirming *Liepelt* holdings); *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981) (extending *Liepelt* nontaxability instruction holding to Outer Continental Shelf Lands Act cases).

In its decision in this case, the Montana Supreme Court incorrectly adopted a "harmless" error standard for reviewing the failure of a trial court to give the requisite *Liepelt* instruction concerning the nontaxability of jury

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[44] In a wrongful-injury action by a railroad employee, the measure of recovery is the "damages as would have compensated him for his expense, loss of time, suffering and diminished earning power." *Michigan Central Railroad v. Vreeland*, 227 U.S. 59, 65 (1913).

awards in FELA cases.[45] The Montana Supreme Court's use of a harmless error standard contravenes this Court's express holding in *Liepelt*. In that case, the Appellate Court of Illinois was reversed for not finding error in the trial court's refusal to issue such an instruction upon request. The Court did not consider whether the lower court's error was harmless, instead holding:

> [I]t was error to refuse the requested instruction in this case. That instruction was brief and could be easily understood. It would not complicate the trial by making additional qualifying or supplemental instructions necessary. It would not be prejudicial to either party, but would merely eliminate an area of doubt or speculation that might have an improper impact on the computation of the amount of damages.

444 U.S. at 498. The failure to give a nontaxability instruction was found to be inherently prejudicial since it is impossible to determine whether a tax-conscious jury improperly increased an award under the mistaken belief that its verdict would be subject to income taxation. In fact, although the *Liepelt* Court speculated as to whether the failure to give a nontaxability instruction may have led to a higher verdict, it specifically stated that "[w]hether or not this speculation is accurate," a remand was required for a new damages trial. 444 U.S. at 497-98.

As the Montana Supreme Court recognized, its decision added to an existing conflict among appellate courts with respect to the use of a harmless error standard. Several federal circuit courts require a new trial on damages

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[45] Defendant's requested jury instruction No. 28 stated:

> Any award you make to plaintiff will not be subject to federal or state income taxes. You should not consider such taxes in arriving at the amount of your award.

App. at 18a.

whenever a lower court refuses a requested instruction on the nontaxability of jury awards in an FELA case. In remanding such a case for a new trial, the Fifth Circuit has expressly held that "[r]egardless of whose [damage] figures are the more correct, *Liepelt* did not require the demonstration of an erroneously inflated award in order to find reversible error in the denial of the requested instruction." *O'Byrne v. St. Louis Southwestern Railway*, 632 F.2d 1285, 1287 (5th Cir. 1980). *See also Lang v. Texas & Pacific Railway*, 624 F.2d 1275, 1278-80 (5th Cir. 1980). The Fourth, Ninth and Tenth Circuits have also summarily reversed trial court judgments, without any analysis of the nature or extent of the error, for failing to give a requested nontaxability instruction.[46] In addition, a number of state appellate courts have held that such a refusal requires a new trial on damages.[47]

On the other hand, one federal circuit court and several state appellate courts have applied a harmless error standard similar to the one adopted in Montana. In *Flanigan v. Burlington Northern, Inc.*, 632 F.2d 880, 889-90 (8th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981), the Eighth Circuit held that the refusal of a trial court to give a requested *Liepelt* nontaxability in-

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[46] *See Fulton v. St. Louis—San Francisco Railway*, 675 F.2d 1130, 1134-35 (10th Cir. 1982); *Cazad v. Chesapeake & Ohio Railway*, 622 F.2d 72, 75-76 (4th Cir. 1980); *Burlington Northern, Inc. v. Boxberger*, 529 F.2d 284, 295-98 (9th Cir. 1975).

[47] *See Sheff v. Concco, Inc.*, 311 S.E.2d 14, 18-19 (N.C. App. 1984); *Oltersdorf v. Chesapeake & Ohio Railroad*, 404 N.E.2d 320 (Ill. App. Ct. 1980), *cert. denied*, 450 U.S. 920 (1981); *Crabtree v. St. Louis—San Francisco Railway*, 411 N.E.2d 19, 23-25 (Ill. App. Ct. 1980); *Seaboard Coast Line Railroad v. Yow*, 384 So.2d 13 (Ala. 1980); *cf. Stowell v. Simpson*, 470 A.2d 1176 (Vt. 1983) (tort action); *Dennis v. Blanchfield*, 428 A.2d 80, 86-87 (Md. Ct. Spec. App. 1981), *aff'd as modified*, 438 A.2d 1330 (Md. 1982) (medical malpractice).

struction was harmless error where the defendant was not precluded from offering relevant evidence of net earnings after taxes and where there was no evidence that the jury inflated its award on the erroneous belief that the verdict would be taxable. *See also Vanskike v. ACF Industries*, 665 F.2d 188, 206-07 (8th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982). The reasoning in *Flanigan* has been followed by several state appellate courts.[48]

It is therefore apparent that a genuine conflict currently exists among the federal and state appellate courts as to the correct standard for reviewing a trial court's refusal to give a requested *Liepelt* nontaxability instruction. For whatever reason, a disturbing number of trial judges are still denying requested jury instructions on the nontaxability of damage awards, while several reviewing courts continue to speculate as to the possible effects such rulings have had on verdicts. As this case aptly reveals, it is virtually impossible to determine the basis for most jury awards, especially when conflicting evidence is presented as to the amount of the pecuniary loss to the plaintiff.[49] Absent further direction from this Court, this important issue of FELA law will remain in a state of disarray.

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[48] *See Faulkenberry v. Kansas City Southern Railway*, 661 P.2d 510, 512-13 (Okla.), *cert. denied*, 464 U.S. 850 (1983) (pre-*Liepelt* trial); *Marlow v. Atchison, Topeka & Santa Fe Railway*, 671 P.2d 438, 442-43 (Colo. Ct. App. 1983); *Caribe Tugboat Corp. v. Duffy*, 427 So.2d 227 (Fla. Dist. Ct. App. 1983) (per curiam), *cert. denied*, 464 U.S. 1041 (1984); *Marynik v. Burlington Northern, Inc.*, 317 N.W.2d 347, 351 (Minn. 1982).

[49] The Montana Supreme Court asserted that the absence of a *Liepelt* instruction was harmless on the assumption that the jury discounted plaintiff's claimed damages of $240,000 in reaching a verdict of $195,000. It is equally plausible, however, that the jury *inflated* BN's annuity evidence as to plaintiff's actual economic loss of only $115,000.

B. The Decision Below Contravenes This Court's Other Holding In *Liepelt* Concerning The Use Of Income Tax Evidence To Compute Lost Earnings

As noted earlier, the Court held in *Liepelt* that it is reversible error for a trial court to exclude evidence of the income taxes payable on past and estimated future earnings claimed as damages. 444 U.S. at 493-96. In this case, the trial court refused to admit tax returns showing the amount of income taxes actually paid by plaintiff, denied BN the opportunity to cross-examine plaintiff's economist on the impact of income taxes on his lost wage calculations,[50] and refused to instruct the jury concerning the appropriateness of basing an award on after-tax net earnings.[51] App. at 21a-24a. The Montana Supreme Court nevertheless affirmed the lower court's judgment, twice failing even to address this aspect of petitioner's appeal.

The exclusion of such evidence in an FELA action is intrinsically prejudicial. As this Court stated in *Liepelt*:

> It is [plaintiff's] after-tax income, rather than his gross income before taxes, that provides the only realistic measure of his ability to support his family. It follows inexorably that the wage earner's income tax is a relevant factor in calculating the monetary loss suffered by his dependents when he dies.

444 U.S. at 493-94. Since *Liepelt*, many federal and state courts have held that such a refusal to allow the introduction of a wage earner's tax liability constitutes reversible error requiring a remand for a new damages

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[50] BN offered to prove that plaintiff's income taxes paid between 1974 and 1982 constituted 17 percent of his gross earnings during that period. Such an amount cannot be deemed *de minimis*.

[51] Petitioner's requested jury instruction no. 17 read as follows:

> In determining your verdict, you should calculate any past loss of earnings on the basis of his net earnings, *i.e.*, the earnings left to him after the payment of income taxes.

App. at 18a.

trial.[52] In addition, at least one state appellate court has summarily reduced an inflated damage award when the trial court refused to consider the tax liability of a plaintiff.[53]

The Montana Supreme Court has disregarded the holdings in *Liepelt* in a way that no other court has previously done. Its combined rulings permitted the jury to consider only evidence of *gross* earnings (contrary to *Liepelt*) and then to render a verdict without any awareness that the judgment would be tax free (again contrary to *Liepelt*). The decision below is so clearly wrong as to warrant summary reversal.[54] In any event, absent this Court's review of the decision below, other reviewing courts may deem it acceptable to disregard the teachings of *Liepelt*, giving rise to the kind of inflated damage awards which the *Liepelt* Court was attempting to prevent.

C. These Damages Questions Require Immediate Clarification By The Court Due To Their Recurring Nature In FELA Actions

The Montana Supreme Court's decision on these tax questions could have serious implications for the thousands of FELA claims brought in the federal and state courts each year. In 1985, 2,221 FELA actions were brought in the federal courts. *See* Annual Report of the Director of

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[52] *See, e.g., Flannery v. United States*, 718 F.2d 108, 111 (4th Cir. 1983), *cert. denied*, 104 S. Ct. 2679 (1984); *Fanetti v. Hellenic Lines*, 678 F.2d 424, 431 (2d Cir. 1982), *cert. denied*, 463 U.S. 1206 (1983); *Oltersdorf v. Chesapeake & Ohio Railroad*, 404 N.E.2d at 324-25; *see also Burlington Northern, Inc. v. Boxberger*, 529 F.2d at 291-95; *compare Paquette v. Atlanska-Plovidba*, 701 F.2d 746 (8th Cir. 1983).

[53] *See Portier v. Texaco, Inc.*, 426 So.2d 623, 630 (La. Ct. App. 1982), *cert. denied*, 433 So.2d 165 (La. 1983).

[54] *See, e.g., St. Louis Southwestern Railway v. Dickerson*, 105 S. Ct. 1347.

the Administrative Office of the United States Courts, at Table C2 (1985). The AAR has estimated that approximately an additional one thousand FELA cases are brought each year in the state courts. In 1984 alone, the railroads collectively paid over one half billion dollars for FELA death and personal injury claims.[55] Virtually every one of these cases involved claims for lost earnings.

As the court below acknowledged, the federal and state courts are not deciding FELA claims in a uniform manner as contemplated by the statute.[56] In those jurisdictions, like Montana, which sanction the disallowance of probative evidence and appropriate jury instructions as to the effect of income taxes on FELA damage awards, plaintiffs will continue to be overcompensated for their personal injuries. Such unfair verdicts, if allowed to stand, most assuredly will fuel the liability explosion which has gripped this country in recent years. In order to ensure that FELA personal injury verdicts remain fair to both the railroads and their employees, a definitive ruling from this Court is required on the consequences of such erroneous rulings.

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[55] Through surveys of its member railroads, the AAR has determined that in 1984 the industry collectively paid out $500,418,048 to employees for FELA death and personal injury claims.

[56] *See* note 41 and accompanying text, *supra*.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the judgment and opinion of the Supreme Court of the State of Montana.

Respectfully submitted,

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